In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
EARL B. COE. } No. 501.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL.

THE CONSTITUTIONALITY OF THE ACT ESTABLISHING THE COURT OF PRIVATE LAND CLAIMS.

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This is an appeal by the United States from a judgment of the Court of Private Land Claims confirming a Mexican grant in favor of the appellee to land in the Territory of Arizona. The motion to dismiss the appeal proceeds upon the ground that so much of the act establishing the Court of Private Land Claims (March 3, 1891, c. 539, sec. 9, 26 Stats., 854) as provides for appeals to this court is unconstitutional. The brief in support of the motion assumes that the act is otherwise valid. But the provision for an appeal to this court seems to be so

closely connected with the rest of the act that the fate of the entire act may be involved in the attack upon the constitutionality of the provision for appeal. An appeal to this court, whose judgment alone in that event is to be final, seems to be such an essential part of the scheme provided by Congress for the adjustment of these Mexican grants that it may well be doubted whether the rest of the act can stand if the provision for appeal is eliminated as unconstitutional.

By article 8 of the treaty of Guadalupe Hidalgo and article 5 of the Gadsden treaty the property of Mexicans within the territories ceded by Mexico to the United States was to be "inviolably respected," and they, their heirs, and grantees were to "enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States" (9 Stat., 929, 930; 10 Stat., 1035). But the duty of fulfilling these treaty obligations rests with the political department of the Government. Congress may either itself discharge that duty by passing directly upon the claims of private claimants, or it may, in its discretion, delegate the determination of such claims to a commission or to a board or to a judicial tribunal. In other words, while claimants under grants made by Mexico or the Spanish authorities prior to the cession have no *right* to a *judicial* determination of their claims (*Astiazaran* v. *Santa Rita Land and Mining Co.*, 148 U. S., 80, 81, 82, and cases cited), Congress may, nevertheless, provide for their determination by *judicial* proceedings if it sees fit. This latter proposition seems to be denied by the appellee, but it is not open to debate. It

is affirmed in terms by Mr. Justice Gray in *Astiazaran* v. *Santa Rita Mining Co.* (148 U. S., 80, 81, 82), and is involved in many prior decisions. In *United States* v. *Ritchie*, (17 How. 525, 533, 534), a proceeding in a district court of the United States for the determination of similar claims was sustained and an appeal therefrom to this court was allowed and determined. In that case the proceeding in the district court was designated an appeal from the California board of commissioners, but, being held invalid as such because the California board did not possess judicial power, it was sustained as an original proceeding in the district court. I do not, of course, suggest that the present appeal can be sustained as an original proceeding in this court, for its original jurisdiction is prescribed by the Constitution, and does not include such a case. The point to which I cite the case is this: That it is competent for Congress, if it sees fit, to provide for the *judicial* determination of claims against the United States for lands granted by the Mexican authorities prior to the cession.

To the same effect is *United States* v. *Arredondo* (6 Pet., 691, 709), where this court entertained an appeal from the superior court for the eastern district of Florida under the act of May 23, 1828, "for the settlement and confirmation of private land claims in Florida;" and in *Botiller* v. *Dominguez* (130 U. S., 238) are cited several cases of judicial proceedings to determine private land claims under treaties. Mr. Justice Miller concludes his opinion in that case by saying (pp. 255, 256):

> There can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not

been submitted to and confirmed by the board provided for that purpose in the act of 1851; or if rejected by that board, confirmed by the District or Supreme Court of the United States.

It was for the purpose of providing for the judicial determination of such claims that the act of March 3, 1891, establishing the Court of Private Land Claims was passed. It covers (section 6) lands "derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming." The jurisdiction of the court is limited to the settlement of claims *as against the United States*, section 13, paragraph 5, providing that "no proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed." The question, therefore, is whether it is competent for Congress to create a court such as the Court of Private Land Claims for the settlement of the claims of private claimants *against the United States* to lands acquired by the United States under the Mexican treaties.

The objection taken to the court is that the judges are not appointed for life, and that they are therefore incapable of being invested with any portion of the judicial power of the United States. They are, however, appointed for the life of the court. Section 1 declares that "the judges of the Court of Private Land Claims shall hold their offices for a term expiring on the 31st day of December, A. D. 1895," and section 19 that "the powers and

functions of the court established by this act shall cease and determine on the 31st day of December, 1895."

We submit—

(1) That the Court of Private Land Claims is not one of the inferior courts mentioned in article 3, section 1, of the Constitution, but that it is a court, created in virtue of the general right of sovereignty of the Federal Government, for the settlement of disputed claims against the Government arising out of its treaty obligations; in other words, that while it exercises judicial power it is not "the judicial power of the United States" within the meaning of article 3; or, if this view be not sound,

(2) That under article 3, section 1, it is competent for Congress to vest any portion of "the judicial power of the United States" in judges who are appointed to hold during the continuance of their offices, although for a limited term; in other words, that the provision of the Constitution that "the judges of the supreme and inferior courts shall hold their *offices* during good behavior" means during good behavior and the continuance of the office.

I.

THE AUTHORITY FOR THE ESTABLISHMENT OF THE COURT OF PRIVATE LAND CLAIMS IS NOT FOUND IN ARTICLE 3, BUT IN OTHER PROVISIONS OF THE CONSTITUTION. IT IS A LEGISLATIVE AND NOT A CONSTITUTIONAL COURT.

While courts in which "the judicial power of the United States" is vested must be established subject to the limita-

tions as to the tenure of the office and the compensation of the judges prescribed by article 3, section 1 of the Constitution, it is well settled that that section of the Constitution does not exhaust the power of Congress to establish courts. In *American Ins. Co.* v. *Canter* (1 Pet., 511), Chief Justice Marshall, speaking of the Territorial courts, said:

> They are legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

The Court of Private Land Claims is not invested with judicial power to settle controversies between persons, but only with power to settle as between private claimants and the United States the obligations assumed by the United States under their treaty with Mexico. This is not the exercise of the judicial power mentioned in article 3 of the Constitution, which extends "to cases in law and equity." The judicial power, it is true, extends also "to controversies to which the United States shall be a party," but that means controversies of an essentially *judicial* nature and does not include suits *against* the United States to enforce their political obligations under treaties.

The judicial power granted to the Federal Government by article 3 is the power to coerce *others* by the judgments of its courts, and not the power to submit claims *against itself* to judicial determination. The latter power every government has, as an incident of sovereignty, without grant. When, therefore, the Federal Government con-

sents, as it may, to submit claims against itself to judicial investigation and determination, it is at liberty either to select the ordinary judicial tribunals or to establish and ordain for that special purpose such courts as it sees fit. To courts so established the limitations of the Constitution affecting judicial tribunals invested with power to settle the claims of one person against another, have no application.

By the eleventh amendment it was in effect declared, contrary to the decision of the court in *Chisholm* v. *Georgia* (2 Dall., 419), that the judicial power conferred by article 3 does not include suits by individuals against States. Chief Justice Jay, in the course of his opinion in *Chisholm* v. *Georgia*, page 478, expressed the wish that the Constitution had extended the judicial power to cases *against* the United States, but was obliged to admit that it did not, and no one has ever been bold enough to make the claim. For any general discussion of the nature of the federal judicial power it is hardly necessary to go behind the learned opinions of Mr. Justice Gray in *Wisconsin* v. *Pelican Insurance Co.* (127 U. S., 265), and in *United States* v. *Lee* (106 U. S., 196, 223), where all the earlier decisions are marshaled.

The Constitution, article 2, section 2, gives authority to the President and the Senate "to make treaties." Article 1, section 8, confers power upon Congress "to constitute tribunals inferior to the Supreme Court," and "to make all laws which shall be necessary and proper for carrying into execution * * * all * * * powers vested by this Constitution in the Government of the United States

or in any department or officer thereof," and article 4, section 3, gives power to Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States." These provisions of the Constitution are ample, we submit, to sustain the Court of Private Land Claims as an inferior tribunal established, not for the exercise of "the judicial power of the United States," mentioned in article 3, but to declare the rights of private claimants against the United States under a treaty, with respect to territory and property claimed by the United States.

It is hardly necessary to add, what I have already intimated, that I do not dispute the proposition of the appellee that the case is not one which can be brought within the original jurisdiction of this court. I also concede that, unless the Court of Private Land Claims is found to be a *judicial* tribunal, this court can not take cognizance of its judgments on appeal, for it is only from judicial tribunals, and not from boards or commissions, that appeals are allowable to this court under the Constitution, since an appeal, in the very nature of things, implies an original *judicial* hearing from which the appeal is taken. If the tenure of the judges, however, is found to be such as Congress may properly establish, no question is open as to the judicial character of the Court of Private Land Claims, for the act of Congress invests it, not only with the name and procedure of a court, but with all the essential characteristics of a judicial tribunal, including the most essential attribute of all, the power to bind the parties by its judgments.

II.

THE JUDICIAL POWER OF THE UNITED STATES UNDER ARTICLE 3 OF THE CONSTITUTION MAY BE VESTED IN TEMPORARY COURTS, PROVIDED THE JUDGES ARE APPOINTED FOR THE LIFE OF THE COURT.

The authority for the establishment of the Court of Private Land Claims as a legislative court under other provisions of the Constitution than article 3, section 1, seems to be sufficiently clear to relieve me from extended discussion of the question whether "the judicial power of the United States" under article 3 can be vested in temporary courts whose judges, although not holding office during their own lives, are nevertheless appointed for the life of the court. That question has never been presented to this court, and in view of the weighty consequences involved in its determination, will hardly be passed upon unless absolutely necessary to the decision of the case.

It is true that in several cases before this court involving an examination of the nature of the judicial power vested in the territorial courts, it has been said that the judges of those courts do not, and by reason of the limited term for which they are appointed, can not exercise "the judicial power of the United States" under article 3 of the Constitution, but it is to be noted that none of the cases present instances of an appointment *to last during the continuance of the office*. They are all instances of appointments for limited terms to *offices* which continue indefinitely, as in the case of territorial judges appointed for four years to an *office* created for an indefinite term, or

in the case put by way of illustration by Mr. Justice Jackson in *Kentucky and Indiana Bridge Co* v. *L. & N. R. R.* (37 Fed. Rep., 567, 612), an appointment as Interstate Commerce Commissioner for the term of six years to an *office* which continues indefinitely.

It was doubtless the intention of the framers of the Constitution to make the judges of the Federal courts independent of legislative control, but that is accomplished if the tenure of the judge is made coincident with the term of the office. But according to the appellee's view no judicial *office* can be created except for the life of one or more incumbents—a limitation not suggested or imposed by any clause of the Constitution.

It is to be observed that the question at bar is not whether a Federal judge, originally appointed for an indefinite term, can be deprived of his compensation and tenure by the *subsequent* abolition of the *office*, but whether it is competent for Congress in the first instance to establish a Federal court, under article 3 of the Constitution, which shall endure for only a limited period, provided the judges are appointed for the whole life of the court. A denial of this power imposes a serious limitation upon the authority of Congress without compensating advantages. In the nature of things the occasion for special tribunals, such as this court and the court of commissioners of Alabama claims, established by the act of June 23, 1874 (c. 459, 18 Stat., 245), is temporary. The independence of the judges is secured by appointing them for the full life of the court, but if the appellee's view prevails, the establishment of courts for such exigencies is practically impossible.

III.

THE COURSE OF PROCEDURE PRESCRIBED FOR THIS COURT ON APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS DOES NOT HAVE THE EFFECT TO CONVERT SUCH APPEALS INTO ORIGINAL PROCEEDINGS.

The act provides (section 9) that—

> On any such appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the Supreme Court thereon shall be final and conclusive.

It is objected that the procedure thus prescribed makes the appeal in fact an original proceeding. It is admitted by the appellee that there is no objection to the direction that every question that was open in the court below shall be open in this court, for that is true of all equity appeals. The objection taken is that authority is given to this court to hear additional testimony. Even if that clause be beyond the constitutional power of Congress, it can easily be eliminated without affecting the rest of the act or the validity of the general provision for appeals. Indeed, the language is only directory and not mandatory. I submit, however, that authority to an appellate court to hear additional testimony does not change the appellate character of the proceeding, or convert it into an original proceeding. The hearing of further testimony—indeed, the hearing of the testimony *de novo*—is an incident of

appellate procedure in many jurisdictions. An appeal does not necessarily imply more than that the subject-matter has already been instituted in and acted upon by some other court. How the appellate jurisdiction shall be exercised depends entirely upon the legislature in the absence of constitutional limitations affecting the procedure. The declaration of the National Constitution is simply that this court "shall have appellate jurisdiction * * * under such regulations as the Congress shall make."

IV.

THE CONSTITUTIONALITY OF THE COURT SO FAR AS IT HAS JURISDICTION OVER LANDS IN THE TERRITORIES IS NOT OPEN TO DEBATE.

In so far as the act establishing the Court of Private Land Claims provides for the determination of claims against the United States to property situated in any of the Territories no objection can be taken to its validity, for it is clearly within the authority of Congress to establish in the Territories, or for the determination of the title to property situated in the Territories, such courts with such tenure in the judges as Congress sees fit. This is decided in the numerous cases that have been before the court involving an examination of the nature of the Territorial courts and the tenure of their judges. The cases are marshaled and reviewed by Mr. Justice Harlan in *McAllister* v. *United States* (141 U. S., 174, 180–184). In the case at bar the judgment concerns land in the Territory of Arizona. No reason is perceived why Congress might not have

directed the controversy to be submitted for decision to the Territorial court, whose judges are appointed for four years. I submit, therefore, that even if the act be found invalid so far as it undertakes to confer jurisdiction for the settlement of claims to land in the States of Nevada, Colorado, and Wyoming, it is constitutional as respects land "within the Territories of New Mexico, Arizona, or Utah," and the appellee's motion must be overruled. Neither he nor any claimant of lands situated in the Territories has a right, in any view, to complain of being remitted to a court whose judges are not appointed for life. And since the great bulk of the unsettled Mexican grants are for lands in the Territories, there is no objection to sustaining the Court of Private Land Claims in its jurisdiction over those lands, even if the act must be held invalid as to lands situated in the States.

The settlement of claims under Mexican grants made prior to the cession has long been deemed a matter of the greatest importance. To upset the scheme provided by Congress in this act establishing the Court of Private Land Claims involves the most serious consequences and embarrassment, not only to the Government, but to thousands of claimants. This much is said only for the purpose of suggesting to the court the practical importance of the question presented by the motion.

LAWRENCE MAXWELL, JR.,
Solicitor-General.